

BEFORE THE STATE OF WASHINGTON
ENERGY SITE EVALUATION COUNCIL

In the Matter of
Application No 2001-01:

SAGEBRUSH POWER PARTNERS, LLC,
KITTITAS VALLEY WIND POWER
PROJECT,

[illegible]

Steven Lathrop has moved to disqualify Mr. Ifie and any representative from the Department of Natural Resources from participating as a member of EFSEC as required by RCW 80.50.030 in the above entitled matter because that agency has entered into an option to lease property to the Applicant for wind generation purposes. He also seeks the same disqualification for Mr. Fryling and any representative from the Department of Community, Trade and Economic Development because that agency has executed its right to participate as a party in the proceeding. As a basis for his motion Mr. Lathrop alleges that the actions of these two agencies has created a conflict of interest and the participation on the council by a member designated by that agency is in violation of the appearance of fairness doctrine.

Mr. Lathrop's motion challenges the very existence of EFSEC. The legislature has designated EFSEC as the agency to site energy facilities in the State of Washington and mandated pursuant to RCW 80.50.030 the representatives on the council to be the directors, administrators, or their designees of the Department of Ecology, Department of Fish and Wildlife, Department of Community, Trade, and Economic Development, Utilities and Transportation Commission and

1 the Department of Natural Resources. Other state agencies can be members for specific
2 applications at their discretion. The local county in which a proposed application is filed also is
3 required to appoint a member or designee. Each of the referred agencies and county are
4 specifically allowed to also participate as a party pursuant to WAC 463-30-050. In this
5 proceeding Kittitas County and the Department of Community, Trade and Economic
6 Development have elected to participate as parties. (It is interesting to note that Mr. Lathrop is
7 asking for only the disqualification of one of the related council members when the grounds he
8 alleges applies to both.) If this challenge is upheld it would ultimately eliminate all Council
9 members except the Chair appointed by the Governor. Each agency and the county has an
10 interest in the areas subject to its jurisdiction, which are potentially impacted by the project and
11 subject to mitigation, including possible monetary compensation to the agency or county. An
12 example would be the mitigation payments and conditions made by the Applicant to and/or on
13 behalf of WDFD, WDOE, CTED, Walla Walla County, and the mitigations stipulations and
14 conditions made with WUTC in the Wallula Application. Thus according to Mr. Lathrop's
15 theory, none of these agencies would be able to participate as parties, provide consulting services
16 to EFSEC or designate a person to sit on EFSEC because each agency would have a potential
17 interest in regard to the impact of any proposed project.

18 The legislature mandated the make up of EFSEC and anticipated the participation of the member
19 agencies as parties to protect the legislative delegated interest of the agency. The legislation
20 contemplated separation of functions. The APA allows separation of functions. The members of
21 EFSEC do not represent the agency or governmental subdivision that appoints them. They
22 represent themselves as EFSEC members separate from their agency or governmental
23 subdivision. Strict ex parte rules have always been applied and a Chinese Wall maintained
24 between them and that agency or governmental subdivision. The purpose of the nature of the
25 membership of the Council is to provide the unique expertise, knowledge and insights by the
members regarding the jurisdictional areas over which the Council has preemptive authority.
The members do not report to anyone in their agency or governmental subdivision regarding
their quasi-judicial function and are totally independent. Members have consistently voted

1 against positions taken by the agency or governmental subdivisions appointing them. For
2 instance note the vote of the member appointed by WDFD in the Northwest Regional Power
3 Facility application against that agency's position.

4 A party alleging the appearance of fairness doctrine must produce sufficient evidence
5 demonstrating bias, such as personal or pecuniary interest on the part of the decision maker.
6 Mere speculation is not enough. In re Haynes, 100 Wash. App. 366, 996 P.2nd 637 (2000). No
7 personal or pecuniary interests have been shown regarding the two EFSEC members being
8 challenged for disqualification. Mr. Lathrop evidently believes that Mr. Efie will receive some
9 pecuniary interest or personal benefit from the lease of DNR land for wind generation purposes.
10 In fact Mr. Efie will receive no benefit from the lease. The only one receiving benefit from the
11 lease will be the citizens of the state of Washington when that income goes into the public
12 schools trust funds.

13 Mere potential partiality is not enough to establish appearance of fairness violation. Additional
14 evidence is needed, such as actual communication concerning the proposal. Bunko v. City of
15 Puyallup Civil Service Commission, 95 Wash. App. 495, 975 P.2nd 1055 (1999). As has been
16 stated above strict ex parte rules have been maintained together with a Chinese Wall between the
17 respective members and their agencies. Mr. Lathrop has provided no showing sufficient to
18 uphold a disqualification pursuant to the appearance of fairness doctrine.

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20 Dated this 21 day of July, 2003

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23 Darrel L. Peebles WSB # 885
24 Attorney for Sagebrush Power
25 Partners, LLC